

Office of Chief Counsel
Internal Revenue Service

memorandum

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to: Janet Anderson - Quality Assurance Branch
Laguna Niguel E: PSP: FE1/90-DAY

from: District Counsel, Southern California District, Laguna Niguel
June Y. Bass, Assistant District Counsel
Erica Y. Wu, Attorney

subject: Taxpayers: [REDACTED] & [REDACTED]
Years: [REDACTED], [REDACTED], [REDACTED], and [REDACTED]

This memorandum is in response to your request for advice on the timeliness of the [REDACTED] refund claim.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such memorandum is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

ISSUES

Whether the [REDACTED] are barred from claiming a refund where a written consent to extend the assessment period for the [REDACTED] tax year is missing but circumstantial evidence establishes the existence of such consent.

CONCLUSION

Based on the records as a whole, the missing consent in fact existed, was executed by the [REDACTED] authorized agent before April 15, [REDACTED], and extended the limitations period at least to [REDACTED], the date the second consent for [REDACTED] was executed; therefore, the [REDACTED] are not barred from claiming the refund for overpayments in taxable years [REDACTED] and [REDACTED].

FACTS

The [REDACTED] reported a \$ [REDACTED] net operating loss ("NOL") in the [REDACTED] tax year (the "Loss Year"), all of which was used to offset their taxable income in [REDACTED].

During the audit of the [REDACTED] and [REDACTED] income tax returns, Revenue Agent Vince Mullet proposed to shift the NOL from [REDACTED] to [REDACTED] and [REDACTED]. Agent Mullet believed that absent a valid § 172(b)(3) election by the [REDACTED] to waive NOL carryback, under the then effective § 172, the NOL should have been carried back to three years preceding the "Loss Year" before it was carried over to [REDACTED]. Since the entire NOL would have been completely exhausted in [REDACTED] and [REDACTED], Agent Mullet's proposed adjustment, if respected, will result in a \$ [REDACTED] deficiency for the [REDACTED] tax year, and overpayments of \$ [REDACTED] and \$ [REDACTED] for [REDACTED] and [REDACTED] tax years, respectively.

Appeals agreed with Agent Mullet's treatment of the NOL, but it disagreed that the [REDACTED] are entitled to a refund for the overpayments in [REDACTED] and [REDACTED] because the statute of limitations for claiming the said refund had expired on April 15, 1998.

Normally, a claim for refund of an overpayment must be filed by the later of three years from the date the return in question was filed or two years from the date the claimed tax was paid.¹ But where, as here, the claimed overpayments result from the carryback of a NOL, the refund claim for the carryback year(s) may be filed by: (1) three years after the return due date (including extension) of the loss year; or (2) six months beyond the expiration of the agreed extension of the assessment period, whichever is later.² In the [REDACTED] case, the operative return for triggering the statute of limitations on the subject refund claim is the [REDACTED] return. Since the [REDACTED] timely filed their

¹ See I.R.C. § 6511(a).

² See I.R.C. §§ 6511(d)(2) and 6511(c).

tax return; their statutory period for claiming a refund expires on April 15, [REDACTED], unless a valid agreement extending the assessment period exists.

When Appeals Officer Annette Streeter searched the administrative file, she found a Form 872, Consent to Extend the time to Assess Income Tax, executed by the [REDACTED] on [REDACTED] and countersigned by Group Manager Maryanne Smith on [REDACTED], extending the [REDACTED] statute of limitations for assessment to [REDACTED] (the "Existing Consent"). The validity of that consent was immediately called into question. To legally extend the statute of limitations on assessment of the [REDACTED] income tax, a Form 872 must be made before the expiration of either April 15, [REDACTED] or the date agreed upon in a prior agreement between the parties.³ Here, the Existing Consent was not signed until almost six months⁴ after the original expiration date of April 15, [REDACTED], which renders it invalid unless there had been a prior extension bridging the gap between April 15, [REDACTED] and [REDACTED]. Appeals Officer Streeter's attempt to locate an earlier Form 872 turned futile. She, thus, determined that the [REDACTED] claim for refund was barred by the applicable statute of limitations.

Further review of the administrative file, however, revealed that the Service had in fact secured an interim extension. Several I.R.S. internal records, including an IDRS transcript, a Form 5348 Examination Update, a Form 895 Notice of Statue Expiration, and Agent Mullet's case history journal, unequivocally show that the Service obtained from the [REDACTED] a consent to extend the statutory period for assessment in [REDACTED] for the period April 15, [REDACTED] to [REDACTED] (the "Missing Consent"). Additionally, agent Mullet's case history indicates that he continued to discuss contents in the Revenue Agent's Report with [REDACTED], a certified public accountant authorized to represent the [REDACTED] during the [REDACTED]/[REDACTED] audit, well after April 15, [REDACTED], the day the statute would have expired had there not been a valid extension.

[REDACTED] also recalled executing two Forms 872 for the [REDACTED] tax year. In a written statement dated [REDACTED], he stated

³ See I.R.C. § 6501(c)(4).

⁴ Treasury regulations specifically require that a consent to extend the time to assess income tax must be executed on behalf of the Commissioner to be valid. Reg. § 301.6501(c)-1(d). Therefore, the Form 872 was not legally enforceable until [REDACTED], the date the group manager signed.

that he signed before Agent Mullet a Form 872 "on or around [REDACTED]
[REDACTED]" which "extended the statute from [REDACTED] to [REDACTED]".

Nonetheless, neither party has been able to produce either the original or the copy of the Missing Consent.

DISCUSSION

The issue here is purely factual. Specifically, it involves a missing Form 872 consent for [REDACTED] tax year which, if found to have existed despite a lack of its physical presence, will enable the [REDACTED] to claim a refund for overpayments in tax years [REDACTED] and [REDACTED]. For the reasons stated below, the answer is affirmative.

- I. Merely because a Form 872 is missing does not in itself invalidate an otherwise legally enforceable agreement to extend the statutory assessment period.

Although a Form 872 is not considered to be a contract, even though signed by both parties, courts have nevertheless interpreted it as though a contract were involved, thereby allowing circumstantial evidence be introduced to prove the existence of parties' agreement to the extension. Aiken v. Burnet, 282 U.S. 277 (1930).

Cases dealing with this precise issue have permitted indirect proof through admissions as evidenced in the I.R.S.'s records and procedures. For instance, in Eclipse Law Mower Co. v. United States, 1 F.Supp. 768 (Ct. Cl. 1932), a waiver of the limitations period purportedly executed by the taxpayer was misplaced in the Commissioner's office and could not be located. The Court of Claims held that notations made in the bureau's record of the taxpayer by the supervising auditor in charge of reviewing a taxpayer's case were sufficient to establish that a waiver was in effect at the time the tax was assessed and collected.

In United States v. Conry, 631 F.2d 599 (9th Cir. 1980), the 9th Circuit affirmed the district court's finding of a validly executed waiver of assessment through admission of the I.R.S.'s normal practice and procedures which established the likelihood that taxpayers had executed the said waiver, notwithstanding the written waiver had been destroyed by the government.

In Huffmeyer v. Commissioner, 52 T.C.M. (CCH) 1487 (1987), the government, through the I.R.S. employees who handled the taxpayers' assessment, introduced evidence establishing the ordinary administrative procedures utilized in obtaining and processing consent forms to ensure their timely execution. Specifically, the

government submitted various internal documents reflecting a limitations date, which, according to the government, indicated that a consent extending the limitations period to that date had in fact been executed by the taxpayers, or else such documents containing that date would never have been generated. Most important, the government there introduced the Form 895 that was contained in the administrative file as an internal "limitations control" document which was updated each time a consent was obtained from a taxpayer and the statutory period extended. Having considered the foregoing, the Court concluded that "[w]here no copy of an executed consent is available, [the government] may nevertheless carry [its] burden by establishing through secondary evidence the existence and timely execution of the consent." Id., at 1495.

Similarly, what we have here are the Service's internal documents reflecting an extension of the original limitations date, documents that would only have been prepared if consent had in fact been obtained. Id. An IDRS entry dated [REDACTED] showed that the assessment period for the [REDACTED] tax year was extended to [REDACTED]. The said entry apparently was entered pursuant to the Form 5348, Examination Update, which contained a statute date of [REDACTED] and was approved by the group manager on [REDACTED]. On the Form 895, block 8(a) "Consent Secured" was checked; moreover, next to block 6 "Statute Date," the original notation "[REDACTED]" was crossed out and replaced with "[REDACTED]". Equally compelling are agent Mullet's recounts of crucial events surrounding the Missing Consent. His case history worksheet depicted them as follows:

[REDACTED] MET WITH REP AT TPRS OFFICE, DISCUSSED BDA VARIANCE AND REVIEWED REPS WORK PAPERS. HAD REP SIGN 872.

[REDACTED] Group Secretary updated statute to [REDACTED]. GM [Group Manager] signed/initialed also.

[REDACTED] 100% IVL report used for Statute sweep denotes [REDACTED] statute as [REDACTED] and verified on [REDACTED]

.

[REDACTED]'s independent recollection also coincides with that of Agent Mullet's.

The statute of limitations is an affirmative defense which requires the party raising it to carry the ultimate burden of persuasion. Rule 142(a); Ryan v. Commissioner, 61 T.C. M. (CCH)

1801 (1991). Based on the evidence at hand, we do not believe that the Service can justifiably deny the existence of the Missing Consent. The Service has in numerous occasions successfully relied on the very same circumstantial proofs to substantiate the existence of a missing consent; it cannot now preclude them from being introduced by the [REDACTED] to establish the same.

II. The actions of both parties were consistent with the existence of the Missing Consent.

Both Agent Mullet and [REDACTED] acted as if a consent extending the original limitation period had been validly executed. They continued deliberations on the NOL issue after April 15, [REDACTED], and even signed a second consent at the time the limitations period extended by the Missing Consent was scheduled to expire. In fact, it was not until Appeals rejected the proposed overpayment adjustment did the parties realize that the first consent form was lost.

The major actions of both parties were not only consistent with the existence of the Missing Consent but would have been wholly inconsistent and illogical if the Missing Consent had not been obtained. Huffmeyer, supra, at 1495. It is inconceivable that the [REDACTED], well represented by a qualified tax professional, would have continued the negotiation and actually later executed another consent unless there was a valid initial extension. Id., at 1496.

Based on the records as a whole, the Missing Consent indeed existed, was executed by the [REDACTED] agent before April 15, [REDACTED], and extended the limitations period at least to [REDACTED], the date the second consent for [REDACTED] was executed. The [REDACTED], therefore, are not barred from claiming a refund for overpayments in taxable years [REDACTED] and [REDACTED]; rather, under I.R.C. § 6511(c), they have until [REDACTED] to raise the subject refund claim.

With the rendering of this advice, we are closing our file. If you have any questions regarding this advice, please call Erica Wu at (949) 360-3439.